

2017

**Sandy City, Plaintiff/Appelle, vs. Kristina Zemaitiene, Defendant/
Appellant.**

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

SANDY CITY,

Plaintiff /Appellee,

vs.

KRISTINA ZEMAITIENE,

Defendant /Appellant.

APPEAL NO. 20170292 -CA

BRIEF OF APPELLANT

APPEAL FROM THE THIRD DISTRICT COURT, SALT LAKE COUNTY, STATE
OF UTAH, FROM A CONVICTION OF INTERFERING WITH AN ARRESTING
OFFICER, AN INFRACTION BEFORE THE HONORABLE HEATHER BRERETON

DOUGLAS JOHNSON
Sandy City Prosecutor's Office
10000 Centennial Pkwy
Sandy, Utah 84070
Telephone: (801) 568-7170

Attorney for Appellee

KRISTINA ZEMAITIENE
P.O. Box 213
Sandy, Utah 84091
Telephone: (801) 755-5253

Pro-se Appellant

FILED
UTAH APPELLATE COURTS

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IN THE UTAH COURT OF APPEALS

SANDY CITY,

Plaintiff / Appellee,

vs.

KRISTINA ZEMAITIENE,

Defendant /Appellant.

APPEAL NO. 20170292 -CA

STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction to hear this appeal pursuant to Utah Code Ann. § 78A-4-103(2)(e).

ISSUES PRESENTED AND STANDARD OF REVIEW

Issue 1: Whether the trial court had subject matter jurisdiction to convict defendant of a non-existent offense.

Standard of Review: Whether the trial court has subject matter jurisdiction presents a question of law which we review “under a correction of error standard, giving no particular defense to the trial court’s determination.” *Case v. Case* 2004 UT App 423, ¶ 5.

Issue 2: Whether the City applied Utah Code § 76-8-305 to defendant in violation of the Utah Constitution’s separation of powers provision.

Standard of Review: “Constitutional challenges to statutes present questions of law, which we review for correctness.” State v. Gallegos, 2009 UT 42, ¶10, 220 P.3d 136.zz

Issue 3: Whether the Utah Constitution guarantees the right to a jury trial to defendants charged with infractions.

Standard of Review: “Constitutional challenges to statutes present questions of law, which we review for correctness.” State v. Gallegos, 2009 UT 42, ¶10, 220 P.3d 136.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES AT ISSUE

The relevant portions of the Utah Constitution, Utah Code and Utah Rules of Criminal Procedure are included in Addendum A hereto including:

Utah Constitution , Article I, Section 10 and 12;

Utah Constitution , Article V, Section 1;

Utah Code Ann. §77-1-6;

Utah Code Ann. §76-8-305;

STATEMENT OF THE CASE

The Sandy City charged defendant in the Sandy City Justice Court with one count of Interference with an Arresting Officer¹, a class B misdemeanor, in violation of Utah Code

¹The current title of the offense is “Interference with Peace Officer”. See §76-8-305.

Ann. §76-8-305 (R.1). Before trial, the City filed an Amended Information charging the offence as an Infraction (R. 4-21). Defendant was convicted in a bench trial and appealed her conviction to the Third District Court (R. 2-3). In the district court, defendant filed a demand for jury trial claiming that the Utah Constitution guarantees the right to a jury trial to defendants charged with infractions (R. 30-66). At a motion hearing, the district court denied defendant's motion (R. 93-94). On the day of the hearing, defendant filed a motion to dismiss information for failure to charge a cognizant offense (R. 108-118). After reviewing the City's objection to the motion and defendant's reply to the objection, the court issued a ruling denying the motion (R. 123-133, 136-14, 148-151).

Following a bench trial in the district court, defendant was found guilty of the offense charged (R. 330-332). Defendant was sentenced to pay a \$150 fine (R. 335-336).

STATEMENT OF FACTS

On December 27, 2014, Unified Police officers Joel Knighton and Denise Lovendahl, working as off-duty plain clothes security guards at the Deseret Industries store in Sandy, were trying to apprehend a shoplifting suspect in the store's parking lot (R. 379-380). Defendant, a store employee, noticed the fight and allegedly tried to aid the suspect by interfering with the arrest. (R. 379-381).

SUMMARY OF ARGUMENTS

The trial court lacked subject matter jurisdiction under Utah Code to adjudicate and convict defendant of an infraction offense not designated by law. The city and the court

usurped the essential legislative function of designating the penalty for the charged offense. By prosecuting legislatively-defined misdemeanor as an infraction, the City violated the Utah constitution's separation of powers provision, thus Utah Code § 76-8-305 is unconstitutional as applied to defendant.

Article I, §§ 10 and 12 of the Utah Constitution give a criminal defendant the right to a jury trial no matter the offense. Accordingly, the trial court should have ruled Utah Code § 77-1-6(2)(e) unconstitutional and empanelled a jury for defendant's trial.

ARGUMENT

I. THE COURT LACKS SUBJECT MATTER JURISDICTION OVER NON-EXISTENT OFFENSES.

The City originally charged defendant by Information in the Sandy City Justice Court with a violation of Utah Code § 76-8-305, which is designated as a class B misdemeanor. Before justice court trial, the City filed an Amended Information charging the offense as an infraction.

The infraction Interference with Peace Officer charge does not exist under Utah Code. A charging information detailing an infraction not designated by law is defective, does not constitute the offense intended to be charged, and therefore divest the trial court of subject matter jurisdiction.

Subject matter jurisdiction "is the power and authority of the court to determine a controversy and without which it cannot proceed." *Thompson v. Jackson*, 743 P.2d 1230, 1232 (Utah Ct. App. 1987). "If a court acts beyond its authority those acts are null and void." *Id.* Subject matter jurisdiction "is derived from the law." *State v. Todd*, 2004 UT

App 266, ¶ 9, 98 P.3d 46. “It can neither be waived nor conferred by consent of the accused.” *Id.* In criminal cases, “[t]he trial court simply would lack the judicial power to convict the defendant of a nonexistent crime.” *State v. Norris*, 2004 UT App 267, ¶ 21, 97 P.3d 732.

The Utah Legislature has long abolished common law crimes, providing that “no conduct is a crime unless made so by this code, other applicable statute or ordinance.” Utah Code § 76-1-105. The Code designates offenses as “felonies, misdemeanors, or infractions.” *Id.* at § 76-3-102. The Utah Legislature has made clear that “[t]he provisions of this code **shall** govern the construction of, the punishment for, and defenses against any offense defined in this code.” *Id.* at § 76-1-103(1) (emphasis added).

Although the Legislature prescribes a precise process by which a particular offense may be reduced in degree *after* conviction, *see* Utah Code § 76-3-402, “Conviction of lower degree of offense – **Procedure and limitations**” (emphasis added), it prescribes no such process for reducing the degree of an offense *prior* to conviction.

Under the interpretive maxim *expressio unius est exclusio alterius* (“the inclusion of one thing implies the exclusion of the alternative”), *Duke v. Graham*, 2007 UT 31, ¶ 15, 158 P.3d 540, the Legislature prohibits the prosecutorial and judicial discretion claimed here. That is, the Legislature has expressed when and how the level of an offense may be reduced – after conviction, by the court, upon a number of certain findings, and limited by certain conditions – meaning it cannot be done otherwise. *See* Utah Code § 76-3-402.

Courts’ “primary goal in interpreting statutes is to give effect to the legislative intent, as evidenced by the plain language, in light of the purpose the statute was meant to

achieve.” *State v. Holm*, 2006 UT 31, ¶ 16, 137 P.3d 726 (citation and internal quotation marks omitted). Courts must “presume that the legislature used each word advisedly and give effect to each term according to its ordinary and accepted meaning.” *Id.* (citation and internal quotation marks omitted).

The Utah Supreme Court in *State v. Barrett* suggested that it would be a “rogue” act for a court to reduce the degree of an offense without legislative authorization. *See* 2005 UT 88, ¶ 13, 217 P.3d 682. *Barrett* held that the trial court abused its discretion to reduce the level of offense *after* conviction, granted by Utah Code section 76-3-402, by reducing a conviction two levels without agreement from the prosecution. *Id.* at ¶ 46.

Under no reading of the statute charged here could the Legislature’s intent be construed to give prosecutors and judges unfettered discretion to charge and adjudicate statutorily-designated misdemeanors as infractions. The Legislature is presumed to have used the word “class B misdemeanor” advisedly in defining the offense, and the “ordinary and accepted meaning” of “misdemeanor” is not “infraction.” In its Amended Information, the City cites no provision of law authorizing such authority, and no such authority exists.

By way of analogy, Utah law defines murder as a first-degree felony (*See* Utah Code Ann. §§ 76-5-203(3)(a), -(3)(b)); if the City be permitted to charge as infractions offenses designated by State Code as misdemeanors, then the State by the same token is permitted to charge as infractions offenses designated by the Legislature as felonies. There is no logical or legal difference between these two propositions. They are both

preposterous. Accordingly, the trial court had to dismiss the City's Amended Information as the court lacked jurisdiction over an offense that does not exist under Utah Code.

II. BY PROSECUTING LEGISLATIVELY-DEFINED MISDEMEANORS AS INFRACTIONS, THE CITY VIOLATES THE UTAH CONSTITUTION'S SEPARATION OF POWERS, THUS THE INTERFERENCE STATUTE IS UNCONSTITUTIONAL AS APPLIED TO DEFENDANT.

By charging and adjudicating legislatively-defined misdemeanors as infractions, the City and the trial court unconstitutionally assume the essential legislative function of defining crimes and fixing their penalties². The Legislature has delegated no such authority, nor could it under the Utah Constitution's Separation of Powers provision. Article V, section 1 of the Utah Constitution states:

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

Utah Const., art. V, § 1.

²In *West Valley City v. McDonald*, this Court held that charging a legislatively-defined misdemeanor as an infraction did not violate Rule 4(d) of the Utah Rules of Criminal Procedure, the defendant did not have a right to a jury trial once the trial court agreed not to impose jail, and the statute disallowing jury trials for infractions did not violate the Federal Constitution. See 948 P.2d 371, 375 (Utah Ct. App. 1997). The *McDonald* Court's holdings are irrelevant here, because the Court did not consider whether such amendments strip a court of subject matter jurisdiction or violate the Utah constitutional provisions defendant invokes.

As the Utah Supreme Court stressed in *State v. Gallion*, Utah's Separation of Powers provision is enshrined as a constitutional imperative. *See* 572 P.2d 683, 686-87 (Utah 1977). The *Gallion* Court determined the intent of article V, section 1 is to "prevent those, who exercise the power assigned by the Constitution to their department, from aggrandizement of their power, however derived, by exercising functions appertaining to another department." *Id.* at 687.

At issue in *Gallion* was whether the Legislature properly delegated authority to the Utah Attorney General to add, delete or reschedule the substances proscribed by the Utah Controlled Substances Act. *See id.* at 685. The Court held the delegation violated Separation of Powers, because it delegated to an executive branch official, charged with enforcing the Controlled Substances Act and defending its constitutionality, the authority to define those same offenses and, effectively, fix their penalties. *See id.* at 689.

The Court observed that "[a] determination of the elements of a crime and the appropriate punishment therefor are, under our Constitutional system, judgments, which must be made exclusively by the legislature." *Id.* at 690. It continued that "[t]he job of the legislature is to define crimes, prescribe penalties, and establish guidelines for prosecutors, judges, and juries for enforcing the law." *State v. Jeffries*, 2009 UT 57, ¶ 13, n. 3, 217 P.3d 265. At that, "[t]he Legislature is not permitted to abdicate or transfer to others the essential legislative function with which it is thus vested" *Gallion*, 572 P.2d 687 (*quoting Western Leather and Finding Co. v. State Tax Commission*, 87 Utah 227, 231, 48 P.2d 526, 528 (1935)). Stated more emphatically:

The power of the legislature to repeal or amend the penalty to be imposed for crime is not a matter of judicial concern. It is part of the sovereign power of the state, and it is the exclusive right of the legislature to change or amend it

Id. at 688.

Here, the Legislature has designated the offense as a class B misdemeanor, which is punishable by a fine of up to \$1000, plus a jail term of up to 180 days. *See* Utah Code §§ 76-3-301(1)(d), 76-3-204(2). Conviction for an infraction is punishable by a fine of up to \$750, but no possibility of jail. *Id.* at §§76-3-301(1)(e), 76-3-205(1). A person charged with a class B misdemeanor is entitled to a jury trial, but a person charged with an infraction is not. *Id.* at § 77-1-6(2)(e).

By the City's amending a legislatively-defined misdemeanor to an infraction, and by the trial court's grant of leave to do so, the City and the trial court have improperly assumed the essential legislative function of defining offenses and fixing penalties for their violation. They simply cannot do so in harmony with the Utah Constitution's mandate that "no person charged with the exercise of powers properly belonging to one ...department[], shall exercise any functions appertaining to either of the others." Utah Const. art. V, § 1. The City performs the "quintessential executive act" of criminal prosecution (*Carter v. Lehi City*, 2012 UT 2, ¶ 46, 269 P.3d 141 (citations omitted)), thus it cannot simultaneously exercise the essential legislative function at issue here.

The City and the trial court have assumed the essential legislative function of designating the penalty for the charged interference offense in violation of separation of

powers. Utah Code § 76-8-305, as applied to defendant, is, therefore, unconstitutional and the Amended Information should have been dismissed.

**III. ARTICLE I, §§ 10 AND 12 OF THE UTAH CONSTITUTION
UNEQUIVOCALLY GUARANTEE DEFENDANTS CHARGED WITH
INFRACTIONS THE RIGHT OF TRIAL BY JURY.**

In *American Bush v. City of South Salt Lake*, the Utah Supreme Court stated that when court interprets the Utah Constitution, it should “analyze its text, historical evidence of the state of the law when it was drafted, and Utah’s particular traditions at the time of drafting.” *See* 2006 UT 40, ¶ 12, 140 P.3d 1235. The goal is to “discern the intent and purpose of both the drafters of our constitution and, more importantly, the citizens who voted it into effect.” *Ibid*.

Here, the text, historical context and particular traditions reveal that the Utah Constitution guarantees a jury trial in *all* criminal cases, even prosecutions for “infractions.” Yet Utah Code and the Utah Rules of Criminal Procedure provide jury trials for all offenses except infractions. *See* Utah Code § 77-1-6(2)(e); Utah R. Crim. P. 17(d).

First, (A) the Constitution’s plain text guarantees the accused in criminal prosecutions the right to a speedy public trial by an impartial jury made up of no fewer than four jurors. Second, (B) the framers viewed jury trials as sacrosanct in all criminal and civil cases, and they conceived of no circumstance by which the right should be

denied. Third, (C) the right to a jury trial for “petty” offenses was well established in the Utah territory long before, and in the state long after, the Constitution was adopted.

Accordingly, any Utah statute or procedural rule denying the right of a jury trial in prosecutions for infractions must be ruled unconstitutional.

A. THE PLAIN LANGUAGE OF ARTICLE I, §§ 10 AND 12 GUARANTEE THE RIGHT TO JURY TRIALS IN ALL CASES.

In *State v. Hernandez*, the Utah Supreme Court stated that because “the best evidence of the drafters’ intent is the text itself, our analysis begins with a review of the constitutional text.” See 2011 UT 70, ¶ 8, 268 P.3d 822 (citations and quotations omitted). And in *Salt Lake City v. Ohms*, it stated, “if a constitutional provision is clear, then extraneous or contemporaneous construction may not be resorted to.” See 881 P.2d 844, 850, n. 14 (Utah 1994).

In its current state, Article I, § 10 of the Utah Constitution provides:

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded. See Utah Const. Art. I, § 10.

Article I, § 12 of the Utah Constitution provides in relevant part:

In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed ... See Utah Const. Art. I, § 12.

Sections 10 and 12 are plain and unambiguous. They guarantee a jury trial in all criminal prosecutions. Section 10 addresses jury trials generally and by the language “In other cases, the Legislature shall establish the number of jurors,” “in no event shall a jury consist of fewer than four persons,” and “In criminal cases the verdict shall be unanimous,” it contemplates no grounds for denying the right to a criminal defendant.

If the drafters intended to limit the right based on the possibility of incarceration, they would have stated so explicitly. Section 12 addresses the rights of criminal defendants in particular, stating, “In criminal prosecutions the accused shall have the right ... to have a speedy public trial by an impartial jury.” This language is also unequivocal, making no provision for a prosecution lacking the right to a jury trial.

In *Intern. Harvester Credit v. Pioneer Tractor*, the Utah Supreme Court squarely held that article I, § 10 guarantees the right to a jury trial in all civil cases. The court’s reasoning was equally, if not more, applicable to criminal jury trials:

The wording of Article I, § 10 lends itself to argument over the intended meaning as to noncapital criminal cases and civil cases. ... A careful reading, however, of the proceedings of the constitutional convention, *Official Report of the Proceedings and Debates of the Convention*, 1895, Vol. I, Pages 258-62, 274-97, 492-95, discloses a virtually unanimous intention on the part of the framers of the Constitution to preserve a constitutional right to trial by jury in civil cases and in noncapital criminal cases.

Although there was dispute in the convention over the number of jurors, and the degree of concurrence necessary for a verdict, there is repeated reference to the intention to insure the underlying right of trial by jury. The whole tenor of the discussion in the constitutional convention, the preliminary drafts, and the final language of Article I, § 10, indicates no intention to limit the constitutional right to a jury to capital criminal cases.

... the constitutional designation of the number of jurors to be used in courts of original jurisdiction **and in courts of inferior jurisdiction** presupposes the existence of the basic right itself. It is not plausible that the framers would mandate the number of jurors to be used in a jury, and the number of jurors required to return a verdict, without intending to secure the basic right itself.

See 626 P.2d 418, 419-20 (Utah 1981) (emphasis added).

Thus, whether infractions be deemed criminal or civil in nature, the Constitution's plain language leaves no question that defendant is entitled to a jury trial.

B. THE FRAMERS CONCEIVED OF NO TYPE OF TRIAL PRECLUDING THE RIGHT TO A JURY.

If text is ambiguous, the Utah Supreme Court permits reference to "historical evidence of the drafters' intent." *State v. Hernandez*, 2011 UT 70, ¶ 8, 268 P.3d 822 (citations and alterations omitted). But, as stressed in *International Harvester*, any reading of the proceedings of the constitutional convention regarding jury trials "discloses a virtually unanimous intention on the part of the framers of the Constitution to preserve a constitutional right to trial by jury in civil cases **and in noncapital criminal cases.**" *Intern. Harvester Credit v. Pioneer Tractor*, 626 P.2d 418, 419 (Utah 1981) (emphasis added).

C. UTAH'S TRADITIONS AROUND THE TIME OF THE FRAMING ENTITLED THOSE CHARGED WITH PETTY OFFENSES TO JURY TRIALS.

At the time of the framing of the Utah Constitution criminal offenses included those not punishable by incarceration. Defendants charged with any criminal offense were entitled to jury trials, and they routinely received them upon demand. Thus, the law and the

traditions around the time of the framing confirm that article I, sections 10 and 12 guarantee jury trials to defendants charged with infractions.

Recently, the Utah Supreme Court issued a unanimous opinion in *Simler v. Chiles* holding that article I, section 10 “guarantees the right to a jury trial in small claims cases in a trial de novo in district court.” See 2016 UT 23, ¶ 2. In *Simler*, the court reiterated that the “right to a jury trial . . . extends only to cases that would have been cognizable at law at the time the constitution was adopted.” *Id.* at ¶12 (quoting *Zions First National Bank v. Rocky Mountain Irrigation, Inc.*, 795 P.2d 658, 661(Utah 1990)). The court then reviewed the territorial laws and the revised statutes from immediately before and after adoption of the Utah Constitution, respectively, to conclude that parties in small claims actions were entitled to trials by jury in justice courts at the time of the framing. *Id.* at ¶¶ 13-17. Accordingly, the court held that the legislature’s subsequent elimination of juries in small claims cases nearly a century later in 1992 violated article I, section 10. *Id.* at ¶ 17.

The same reasoning yields the same conclusion here. That is, immediately before and after the framing, territorial and state law guaranteed jury trials to those charged with petty offenses and offenses that Utah Code now designates as infractions. Indeed, the Compiled Laws of Utah (pre-statehood) and the Revised Statutes of Utah (post-statehood) defined crimes identically as follows:

A crime or public offense is an act committed or omitted in violation of a law forbidding or commanding it, and to which is annexed, upon conviction, **either of the following punishments:**

1. Death.
2. Imprisonment.
3. Fine.
4. Removal from office; **or**,

5. Disqualification to hold and enjoy any office in this Territory.

See UTAH COMP. LAWS § 4378 (1888); UTAH REV. STAT. § 4061 (1898).

Critically, criminal offenses were not limited to those punishable by death or imprisonment, but also included those punishable by fine, removal from office, or disqualification. Infractions under current Utah Code are materially no different; they are punishable by fine, forfeiture, or disqualification. *See* Utah Code § 76-3-201(2) (2017). The legislature merely gave misdemeanors not punishable by imprisonment a different name with its repeal and reenactment of the Criminal Code in 1973³. The Utah Code of Criminal Procedure from the time of the 1973 overhaul of the Criminal Code continued to permit jury trials for all offenses, stating that criminal defendants are entitled “[t]o have a speedy public trial by an impartial jury of the county in which the offense is alleged to have been committed...” Utah Code Ann. § 77-1-8(6) (1978). It was not until 1980, when the legislature repealed and reenacted the Utah Code of Criminal Procedure, that the statutory right to a jury trial was eliminated for prosecutions of infractions. *See* Utah Code § 77-1-6(2)(e) (enacted in its current form by Chapter 15, Laws of Utah 1980, Gen. Sess.) At that, the legislature would have had no cause to eliminate jury trials for infractions unless then-existing law at least implicitly permitted them.

³ Utah Code §76-3-102, designating offenses as “felonies, misdemeanors, or infractions,” as enacted by Chapter 196, Laws of Utah 1973, Gen. Sess.; *see also Allgood v. Larson*, 545 P.2d 530, 531 (Utah 1976) (“The legislature has created a new class of offenses known as infractions.”). Since before statehood, and until the 1973 repeal and reenactment of the Criminal Code, offenses were designated as felonies and misdemeanors. *See* UTAH COMP. LAWS § 4379 (1888); UTAH REV. STAT. § 4062 (1898); Utah Code Ann. § 76-1-12 (1953).

The Penal Code before⁴ and after⁵ statehood defined numerous crimes not punishable by imprisonment, or punishable by imprisonment of six months or less, which is the benchmark for “petty offenses” under federal constitutional jurisprudence beyond which a jury trial is guaranteed. *See Baldwin v. New York*, 399 U.S. 66, 69 (1970). Yet territorial law governing criminal procedure in justice courts did not distinguish the right according to the potential penalty, stating without qualification: “A trial by jury shall be deemed to be waived unless a jury be demanded by the defendant. If he demand a jury, it shall be formed in the manner provided in this chapter.” UTAH COMP. LAWS § 5318 (1888). After statehood, the relevant provision governing criminal procedure in justice courts was equally unequivocal, stating, “A trial by jury shall be deemed to be waived unless a jury is demanded by either party.” UTAH REV. STAT. § 5139 (1898).

Accordingly, Utah’s legal traditions and widespread practice at the time the Constitution was adopted entitled defendants to juries even for petty offenses, including infractions. Taken with the unambiguous plain text of article I, sections 10 and 12, and

⁴*See* UTAH COMP. LAWS §4401 (1888) (Taking rewards for deputation, punishable by \$1,000 fine); §4438 (Refusing to aid officers in arrest, etc., punishable by \$100 fine); § 4479 (Duties of officers to prevent duels, punishable by \$500 fine); §4515 (Keeping open places of business on Sunday, punishable by \$5-\$100 fine); §4522 (Selling liquor at camp or field meetings, punishable by \$5-\$500 fine); §4524 (Procuring females to play on musical instruments in public, punishable by \$100 fine and one month jail); §4598 (Disturbing the peace, punishable by \$200 fine and two months jail).

⁵*See* UTAH REV. STAT. §4186 (1898) (officer fails to prevent a duel, punishable by \$500 fine); §4144 (refusal to aid officer, punishable by \$100 fine); §4085 (selling official appointment, punishable by \$1,000 fine); §4234 (keeping business open Sunday, punishable by \$100 fine); §4241 (selling liquor near camp meeting, punishable by \$500 fine); §4244 (procuring female to play music, punishable by one month jail and \$100 fine); §4310 (disturbing the peace, punishable by \$200 fine and two months jail);

the framers' implicit and explicit refusals to condition the right on the possibility of incarceration, there is no doubt that the Utah Constitution guarantees the right to trial by jury for infractions.

CONCLUSION

Defendant requests that this Court vacate the district court's verdict because the court acted without a subject matter jurisdiction. In addition, the criminal statute was applied to defendant in violation of the Utah Constitution, and defendant was tried without the benefit of a jury trial.

DATED this 24th day of August, 2017.



Kristina Zemaitiene

CERTIFICATE OF SERVICE

I hereby certify that on the 24th day of August, 2017, I mailed two true and correct copies of the foregoing Brief of Appellant to Douglas Johnson, Sandy City Prosecutor's Office, 10000 Centennial Pkwy, Sandy, Utah.



Kristina Zemaitiene

ADDENDUM A

UTAH CONST. ART. I, § 10

In capital cases the right of trial by jury shall remain inviolate. In capital cases the jury shall consist of twelve persons, and in all other felony cases, the jury shall consist of no fewer than eight persons. In other cases, the Legislature shall establish the number of jurors by statute, but in no event shall a jury consist of fewer than four persons. In criminal cases the verdict shall be unanimous. In civil cases three-fourths of the jurors may find a verdict. A jury in civil cases shall be waived unless demanded.

UTAH CONST. ART. I, § 12

In criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation against him, to have a copy thereof, to testify in his own behalf, to be confronted by the witnesses against him, to have compulsory process to compel the attendance of witnesses in his own behalf, to have a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed, and the right to appeal in all cases. In no instance shall any accused person, before final judgment, be compelled to advance money or fees to secure the rights herein guaranteed. The accused shall not be compelled to give evidence against himself; a wife shall not be compelled to testify against her husband, nor a husband against his wife, nor shall any person be twice put in jeopardy for the same offense.

Where the defendant is otherwise entitled to a preliminary examination, the function of that examination is limited to determining whether probable cause exists unless otherwise provided by statute. Nothing in this constitution shall preclude the use of reliable hearsay evidence as defined by statute or rule in whole or in part at any preliminary examination to determine probable cause or at any pretrial proceeding with respect to release of the defendant if appropriate discovery is allowed as defined by statute or rule.

UTAH CONST. ART. V, § 1

The powers of the government of the State of Utah shall be divided into three distinct departments, the Legislative, the Executive, and the Judicial; and no person charged with the exercise of powers properly belonging to one of these departments, shall exercise any functions appertaining to either of the others, except in the cases herein expressly directed or permitted.

UTAH CODE ANN. § 76-8-305 (2017)

§76-8-305. Interference with peace officer.

- (1) A person is guilty of a class B misdemeanor if the person knows, or by the exercise of reasonable care should have known, that a peace officer is seeking to effect a lawful arrest or detention of that person or another person and interferes with the arrest or detention by:
 - (a) use of force or any weapon;
 - (b) refusing to perform any act required by lawful order:
 - (i) necessary to effect the arrest or detention; and
 - (ii) made by a peace officer involved in the arrest or detention; or
 - (c) refusing to refrain from performing any act that would impede the arrest or detention.
- (2) Recording the actions of a law enforcement officer with a camera, mobile phone, or other photographic device, while the officer is performing official duties in plain view, does not by itself constitute:
 - (a) interference with the officer;
 - (b) willful resistance;
 - (c) disorderly conduct; or
 - (d) obstruction of justice.

UTAH CODE ANN. § 77-1-6(2)(e) (1980)

§ 77-1-6. Rights of defendant.

- (1) In criminal prosecutions the defendant is entitled:
 - (a) To appear in person and defend in person or by counsel;
 - (b) To receive a copy of the accusation filed against him;
 - (c) To testify in his own behalf;
 - (d) To be confronted by the witnesses against him;
 - (e) To have compulsory process to insure the attendance of witnesses in his behalf;
 - (f) To a speedy public trial by an impartial jury of the county or district where the offense is alleged to have been committed;
 - (g) To the right of appeal in all cases; and
 - (h) To be admitted to bail in accordance with provisions of law, or be entitled to a trial within 30 days after arraignment if unable to post bail and if the business of the court permits.
- (2) In addition:
 - (a) No person shall be put twice in jeopardy for the same offense;
 - (b) No accused person shall, before final judgment, be compelled to advance money or fees to secure rights guaranteed by the Constitution or the laws of Utah, or to pay the costs of those rights when received;
 - (c) No person shall be compelled to give evidence against himself;
 - (d) A wife shall not be compelled to testify against her husband nor a husband against his wife; and
 - (e) No person shall be convicted unless by verdict of a jury, or upon a plea of guilty or no contest, or upon a judgment of a court when trial by jury has been waived or, in case of an infraction, upon a judgment by a magistrate.